Supreme Court, U.S.
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No. 96-1167

In the Supreme Court of the United States

OCTOBER TERM, 1996

SWARAN KUMAR JAIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTION PRESENTED

Whether a conviction for "knowingly and willfully solicit[ing] or receiv[ing]" payments from Medicare providers in exchange for patient referrals, in violation of the Medicare anti-kickback statute, 42 U.S.C. 1320a-7b(b)(1)(A), requires proof that the defendant knew that his conduct was unlawful.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Carella v. *California*, 491 U.S. 263 (1989)	9
Cheek v. *United States*, 498 U.S. 192 (1991)	5, 6, 7
Hanlester Network v. *Shalala*, 51 F.3d 1390 (9th Cir. 1995)	7
National Organization for Women, Inc. v. *Scheidler*, 510 U.S. 249 (1994)	9
Ratzlaf v. *United States*, 510 U.S. 135 (1994)	5, 6
Spies v. *United States*, 317 U.S. 492 (1943)	6
United States v. *Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20 (1st Cir. 1989)	8
United States v. *Piervinanzi*, 23 F.3d 670 (2d Cir.), cert. denied, 513 U.S. 900, 904 (1994)	9

Statutes:

Medicare and Medicaid Amendments of 1980, Pub. L. No. 96-499, Tit. IX, § 917, 94 Stat. 2625	6
18 U.S.C. 371	2
18 U.S.C. 666	2
18 U.S.C. 1341	2
42 U.S.C. 1320a-7b(b)(1)	7
42 U.S.C. 1320a-7b(b)(1)(A)	2, 4, 5
42 U.S.C. 1320a-7b(b)(2)	7

Miscellaneous:

H.R. Rep. No. 1167, 96th Cong., 2d Sess. (1980)	6
Health Care Financing Admin., Medicare and Medicaid (CCH) (1993)	9

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 93 F.3d 436. The opinion of the district court (Pet. App. 16-26) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1996. Cross-petitions for rehearing were denied on October 22, 1996. Pet. App. 27. The petition for a writ of certiorari was filed on January 17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Missouri,

petitioner was convicted on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; one court of soliciting and receiving remuneration for referring Medicare patients to a hospital, in violation of 42 U.S.C. 1320a-7b(b)(1)(A) (the Medicare anti-kickback statute); one count of bribery in connection with patient referrals to a hospital that received benefits in excess of $10,000 under a federal program, in violation of 18 U.S.C. 666; and 16 counts of mail fraud, in violation of 18 U.S.C. 1341. The district court vacated the conspiracy and bribery convictions on petitioner's post-trial motion. The court sentenced petitioner to concurrent terms of five years' probation, including six months of home detention, and ordered him to pay a fine of $10,000. The court of appeals affirmed the conviction under the anti-kickback statute but reversed the mail fraud convictions and remanded for resentencing; the court also affirmed sentencing determinations challenged by the government on cross-appeal. Pet. App. 1-15.

1. Petitioner, a psychologist in private practice, operated the Center for Mental Health Services, Inc., an outpatient therapy clinic in Leavenworth, Kansas. North Hills Hospital, an acute-care psychiatric hospital in Kansas City, Missouri, paid petitioner for patient referrals. Between July 1989 and October 1990, North Hills made 19 payments totaling $40,500 to petitioner, with the payments increasing in amount and frequency during 1990. Petitioner referred 49 patients to North Hills in 1989 and 1990. One was a Medicare beneficiary; 30 were insured by the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), a Defense Department program; and the rest were privately insured. Pet. App. 2-4; Gov't C.A. Br. 2, 10.

At petitioner's trial, a North Hills administrator testified that his September 1989 letter to petitioner promising to pay him $1,000 per month for "marketing" was in fact an agreement to pay him for patient referrals. According to the administrator, petitioner provided no documentation of any subsequent marketing services. Instead, their conversations repeatedly linked the payments to petitioner's substantial volume of patient referrals. The administrator testified that it was "very unusual for a professional person to make it so clear that they are willing to exchange patients for money," and to discuss the subject "in such an open manner." Pet. App. 2; Gov't C.A. Br. 4-5.

Another North Hills administrator testified that petitioner provided little if any tangible marketing support, demanded higher payments, threatened to refer his patients elsewhere if the payments were not increased, and once showed him a letter from a competing hospital offering to pay $2,500 for each referral. North Hills ceased making payments to petitioner in October 1990, when a new administrator refused to continue the practice. Pet. App. 3; Gov't C.A. Br. 7-8.

2. Petitioner testified in his own defense. He denied ever requesting money for patient referrals and stated on direct examination that such conduct would be "stupid," "illegal," "unethical," and "wrong." Pet. App. 3, 9. He also denied receiving a letter from one of North Hills's competitors offering to pay him $2,500 per referral. *Id.* at 3. Petitioner testified that he was supposed to receive $100 an hour for conducting mental health workshops and other promotional activities in the community. *Ibid.* He also claimed that North Hills had underpaid him for the time he

spent on those marketing activities, and that as a result he had terminated the fee arrangement. *Ibid.*

Petitioner was convicted on, *inter alia*, one count of violating 42 U.S.C. 1320a-7b(b)(1)(A). That provision establishes criminal penalties for any person who "knowingly and willfully solicits or receives any remuneration * * * in return for referring an individual to" a provider of services paid for by Medicare. See Pet. App. 6 n.1. In explaining the elements of the offense, the district court instructed the jury that "the word 'willfully' means unjustifiably and wrongfully, known to be such by [petitioner]." *Id.* at 7. The court "also instructed that 'good faith' was a defense to this charge, explaining that [petitioner] acted in good faith if he believed he was being paid for promoting North Hills, not for referring patients." *Ibid.* The court declined, however, to instruct the jury that petitioner could be convicted only if he was found to have "intentionally violated a known legal duty." *Ibid.*

3. The court of appeals affirmed petitioner's conviction under Section 1320a-7b(b)(1)(A). Pet. App. 5-9. The court rejected petitioner's contention that knowledge of illegality is required to establish the mens rea element of that offense. The court explained that "[b]oth the plain language of th[e] statute, and respect for the traditional principle that ignorance of the law is no defense, suggest that a heightened mens rea standard should only require proof that [petitioner] knew that his conduct was wrongful, rather than proof that he knew it violated 'a known legal duty.'" *Id.* at 9.

The court of appeals concluded, in the alternative, that any error in the district court's instruction was harmless. The court explained:

> [Petitioner's] defense was that he did not take money from North Hills for referring patients. On direct examination, he testified that payments for patient referrals are not only "unethical" and "wrong," they are "illegal." That testimony effectively took mens rea out of the case, for [petitioner] acknowledged that, if the jury disbelieved his denials, he would be guilty under his own requested instruction as well as the instruction given by the district court.

Pet. App. 9.

ARGUMENT

1. Petitioner renews his contention that, in order to have acted "willfully" under 42 U.S.C. 1320a-7b(b)(1)(A), he had to have known that accepting kickbacks for patient referrals was illegal. Pet. 7-24. That claim is incorrect. "The general rule that ignorance of the law or a mistake of law is no defense to a criminal prosecution is deeply rooted in the American legal system." *Cheek* v. *United States*, 498 U.S. 192, 199 (1991). In arguing that the statute in this case is an exception to that rule, petitioner principally relies (see Pet. 11) on the holding in *Ratzlaf* v. *United States*, 510 U.S. 135, 137 (1994), that the "willfully violating" requirement of the currency structuring prohibition demands proof that the defendant "acted with knowledge that his conduct was unlawful." The Court in *Ratzlaf*, however, did not establish a per se rule that a conviction for "willful" acts requires proof that the defendant understood the illegality of his

conduct. To the contrary, the Court recognized that the term "willful" "is a 'word of many meanings,' and 'its construction [is] often . . . influenced by its context.'" *Id.* at 141 (quoting *Spies* v. *United States*, 317 U.S. 492, 497 (1943)). Indeed, the *Ratzlaf* Court explicitly reaffirmed the "venerable principle" that ignorance of the law is not a defense. *Id.* at 149. See also *Cheek*, 498 U.S. at 209 (Scalia, J., concurring in the judgment) (noting that, "in many contexts, [the word] 'willfully' refers to consciousness of the act but not to consciousness that the act is unlawful").

As the court of appeals pointed out, "[t]he statute at issue in *Ratzlaf* made criminal a willful violation of another anti-structuring statute." Pet. App. 8; see *Ratzlaf*, 510 U.S. at 146-147. "[I]n the Medicare anti-kickback statute," by contrast, "the word 'willfully' modifies a series of prohibited acts." Pet. App. 9. This case is governed by the general rule that ignorance of the law is no defense, rather than by the exception recognized in *Ratzlaf*.[1]

There is no merit to petitioner's contention that the anti-kickback statute is part of such a complex regulatory scheme that a knowledge-of-illegality re-

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[1] Petitioner's reliance (see Pet. 20-21) on legislative history is misplaced. Congress added the elements "knowingly and willfully" to the Medicare anti-kickback statute in 1980 (see Medicare and Medicaid Amendments of 1980, Pub. L. No. 96-499, Tit. IX, § 917, 94 Stat. 2625) to avoid the imposition of criminal penalties on an individual "whose conduct, while improper, was inadvertent." H.R. Rep. No. 1167, 96th Cong., 2d Sess. 59 (1980). The statute need not be construed to require knowledge of illegality, however, in order to avoid the imposition of criminal sanctions on persons whose conduct is "inadvertent." Rather, it is sufficient to require proof that the defendant acted voluntarily and intentionally.

quirement is necessary to avoid "ensnaring unintentional violators." Pet. 18. In *Cheek*, this Court noted that, "largely due to the complexity of the tax laws," it had long "interpreted the statutory term 'willfully' as used in [those laws] as carving out an exception to the traditional rule" that ignorance of the law or a mistake of law is no defense to criminal prosecution. 498 U.S. at 200. Petitioner cannot establish, however, that the provision under which he was convicted is so complex that *Cheek*'s knowledge-of-illegality standard was needed to prevent him from being penalized for "frank difference of opinion or innocent errors made despite the exercise of reasonable care." *Id.* at 205 (citations omitted). Petitioner's own trial testimony—in which he admitted knowing that acceptance of money for patient referrals is not only "unethical" and "wrong," but "illegal," Pet. App. 3, 9—belies his attempt to portray himself as "[u]nsure of which financial relationships are permitted [under the anti-kickback statute] and which are not," Pet. 23.

2. As petitioner notes (Pet. 10-14), the Ninth Circuit has held that liability under the Medicare anti-kickback statute requires proof that the defendant "engage[d] in prohibited conduct with the specific intent to disobey the law." *Hanlester Network* v. *Shalala*, 51 F.3d 1390, 1400 (1995). The *Hanlester* court's discussion of the anti-kickback statute's scienter requirement focused on 42 U.S.C. 1320a-7b(b)(2), which applies to persons who "knowingly and willfully offer[] or pay[]" kickbacks, rather than (as here) Section 1320a-7b(b)(1), which applies to persons who "knowingly and willfully solicit[] or receive[]" kickbacks. See 51 F.3d at 1400. *Hanlester* also differs from the instant case in that it arose in the context of

an administrative debarment proceeding rather than a criminal prosecution. Those distinctions do not appear to have influenced the Ninth Circuit's determination that the term "willfully" should be construed to require knowledge of illegality.[2]

Nevertheless, further review is not warranted here. Because only two courts of appeals have spoken to the issue of whether the Medicare anti-kickback statute requires proof of knowledge of illegality, the issue in this case would benefit from further consideration in the lower courts before this Court intervenes.[3] The present case, moreover, would be an

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[2] Contrary to petitioner's claim (Pet. 13-14), however, the First Circuit did not adopt a knowledge-of-illegality requirement in *United States* v. *Bay State Ambulance & Hospital Rental Service, Inc.*, 874 F.2d 20 (1989). The district court in *Bay State* had instructed the jury that "[w]illfully means to do something purposely, with the intent to violate the law, to do something purposely that law forbids." *Id.* at 33. The defendants appealed, arguing that the district court had erred in failing to give an additional instruction. *Ibid.* Reviewing for plain error, the First Circuit characterized the instruction given by the district court as "appropriate." *Ibid.* Read in context, that statement meant only that the instruction given did not prejudice the defendants—*i.e.*, that the failure to give the additional instruction was not reversible error. The *Bay State* court did not address the question whether a defendant could be convicted under the anti-kickback statute without a finding that he knew his conduct to be illegal.

[3] Petitioner also notes (see Pet. 16-17) that a manual issued in 1981 by the Health Care Financing Administration (HCFA), an agency within the Department of Health and Human Services (HHS), defined the term "willfully" as follows:

> The term "willfully" means voluntarily, purposefully, deliberately, and intentionally as opposed to accidently, inadvertently, or carelessly. It involves actual knowledge of

inappropriate vehicle for resolving the issue. As the court of appeals explained, during his testimony petitioner denied that he referred patients for money and admitted that he knew such conduct to be illegal. "That testimony effectively took mens rea out of the case," because "if the jury disbelieved [petitioner's] denials, he would be guilty under his own requested instruction." Pet. App. 9. Because the court of appeals correctly found that any instructional error in this case was harmless, *Carella* v. *California*, 491 U.S. 263, 270-271 (1989) (Scalia, J., concurring in the judgment), petitioner would not benefit even if his contention on the meaning of the statute were accepted.

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the existence of a legal obligation and the intent to evade that obligation.

Medicare and Medicaid (CCH) ¶ 13,915.17 (1993). The court of appeals' ruling in this case is inconsistent with the second sentence of that definition. The quoted portion of the manual does not refer specifically to the anti-kickback statute, however, but is intended as a generic definition of the term "willfully." And the brief for the Secretary of HHS filed in *Hanlester* makes clear that the agency does not currently construe the anti-kickback statute to require knowledge of illegality. Gov't C.A. Br. at 38-43, No. 93-55351 (9th Cir.); cf. *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 261 (1994) (internal Department of Justice guidelines issued in 1981 were owed no deference when they had been amended in relevant respects in 1984). In any event, an internal agency manual does not govern the construction of the statute. See *United States* v. *Piervinanzi*, 23 F.3d 670, 682-683 (2d Cir.), cert. denied, 513 U.S. 900, 904 (1994).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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